In The United States Court of Appeals for the Ninth Circuit

Nos. 16383, 16401

MORRISON-KNUDSEN COMPANY, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL 341, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside and on Request to Enforce on Order of the National Labor Relations Board

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REPLY BRIEF FOR PETITIONER

I. It is eminently clear from its brief that the Board fully appreciates that unless it can establish, in fact, that the Company and Union operated under an illegal closed shop arrangement, then there exists no sound legal basis for enforcing its order. In its effort to establish the existence of such a proscribed arrangement, the Board's "Counterstatement of the Case" presents "facts" which plainly are not supported by substantial evidence in the record and "facts" which are not based upon any evidence whatsoever in the record.[1] Specifically, for example, the Board's statement of the "facts" is inaccurate in the following respects:

[1] It is of significance to note that Respondent does not assert at any point in its brief that the detailed "Statement of the Case" in Petitioner's brief is inaccurate or inadequate in any respect. Apparently, the Board felt it necessary to make new and additional findings at this time to support its determintion. Thus, the Board's brief arrogates to itself the function of fact finder, credits "favorable" witnesses despite contradictory testimony on their part, ignores "unfavorable" witnesses and credits the testimony of a witness where, and only to the extent, it feels such testimony might lend some support for its inferences. In short, the Board brief would now support its closed shop theory upon a version of the facts fundamentally different from that which the Board found.

1. On page 3, line 10: All new hires for this project were not cleared through the Company's office at Anchorage as witness the testimony of Erickson that "new hires could be picked up at the job location" without clearance (R. 332-333).

2. On page 3, the statement that Erickson "assumed that an employee had to join the Union before he could get a dispatch slip" is inaccurate in that Erickson only "assumed" that "the people that 341 assigns . . . are members of Local 341" (R. 352). The distinction is vital. The Board's misstatement tends to support its closed-shop theory whereas the statement actually made by Erickson does not.

3. The statement on page 3 that "Wargny never hired non-union employees" similarly tends, read alone, to support a "closed-shop" theory but is misleading if not read in the context of his immediately preceding testimony that he was never told that he "couldn't hire non-union people" and that, as a matter of fact he could hire non-union people (R. 161).

4. There is nothing in the cited record references to support the Board's statement on page 4 that "If the site superintendent requested a particular individual by name, the personnel office first checked the Company files to determine whether . . . he was a union member." Indeed, the witness (Wargny) upon whom the Board is relying in this connection, testified flatly that he did not know why a person's union affiliation was on the employment application blank (R. 140).

5. The statements at the bottom of page 4 and top of page 5 that the Company was "allowed to fill only half of its vacancies with individuals requested by it" and "the unions insisted on unilaterally filling at least half of such vacancies" are based solely on Wargny's testimony which, aside from its lack of credibility, hardly provides a substantial basis for such a finding in the light of Brady's testimony that "as to the percentage or the number of named personnel you could request," "there certainly was

nothing ever written or was I ever instructed'' (R. 227), and in view of Erickson's testimony that he had no agreements with the Union other than those contained in the AGC-AFL Alaska Territory Agreement (R. 350-351). As a matter of fact, Brady testified that it was the *Company's policy* not to ''continually ask for every man by name'' because it was not ''fair'' (R. 228).

6. The Board made no finding, as indicated on Page 5, concerning an inquiry on the Company's employment application forms as to union affiliation and it is, accordingly, now improper for the Board to dredge up this ''fact'' to solicit judicial support for a determination which was not predicated in any manner whatsoever on this ''fact''. The Trial Examiner gave ''no consideration as to whether the M-K employment application . . . was violative of the Act for the sole reason that the consolidated complaint raised no such issue'' (R. 29).

7. The Board avers on page 5 that ''no employee ever reported for work without a dispatch slip.'' The record simply does not support such a statement. The cited record reference simply refers to a situation in which Wargny personally contacted a named person and even as to this limited class of personnel there may well have been some (not within Wargny's knowledge) who reported without a dispatch slip (R. 146). And, of course, as the record plainly shows many employees were hired at job sites without any contact whatsoever with the Union.

8. The last two sentences on page 5 of the Board's brief are apparently designed to leave the impression that Union refusal to clear some individuals requested by the Company was predicated upon a lack of union membership. Yet the record is clear that on the alleged ''very few instances'' in which the Union ''refused'' a named request the Union was attempting to secure employment for ''men on the bench that had priority'' (R. 160) or men who were in ''dire need of work, who had been on the bench for a long time'' (R. 227). This certainly does not constitute even any evidence of discrimination, let alone evidence of a closed shop. See

NLRB v. *Turner Construction Co.* 227 F. 2d 498, CA 6. But even under such circumstances, the Company's personnel officer's "job was to keep the site satisfied, so we tried to get the named requests whenever possible" *(ibid),* from which it may be reasonably referred, the Union's "refusal" was not conclusive. In any event, we submit, there is no substantial evidence to support the view that the Union refused to dispatch any non-union man.

9. The record does not show that the college students, as stated on page 6, "were processed in the regular way". On the contrary, their employment was of such a nature that the treatment accorded them was unusual so as to minimize the possibility of friction between them and local construction workers (R. 203, 206, 318). Indeed, it is strange that Wargny testified that the college students "were processed in the regular way" in view of his testimony that he had nothing to do with processing them but only "sent them to the girls that did the processing." (R. 132)

10. The Board's brief at page 7 states that Haugen "*said flatly* that they 'would have to join the Union' . . ." despite the Trial Examiner's finding that Haugen "*stated, in effect* . . . that they would have to join Local 341 . . ." (Emphasis supplied). We submit that the record does not support the conclusion that Haugen made either a flat or implied statement to that effect. See Petitioner Union's main brief, pages 12-13.

11. On pages 7-8 of the Board's brief, the testimony of Abolins (R. 176) as to what Groothuis said is in direct conflict with Abolins' subsequent testimony that he could not recall any statement by Groothuis about the necessity of joining the Union (R. 194-195). And the earlier testimony of Abolins is not as clear-cut as the Board's brief makes it appear in view of Abolins' concluding phrase, which the Board's brief deletes in its citation, to wit: "or that was the idea I got" (R. 176).

12. The Board's brief at page 12 erroneously states that "the Company always conditioned employment upon Union

membership and clearance." The plain fact is that the Company hired many employees without regard to union membership and clearance as is clearly evident, e.g., from the Board's holding that "We find insufficient basis in the record for holding that the hiring of these 26 was delayed because of their lack of membership in the Union, rather than for the economic reasons testified to by the Company" (R. 83).

13. There is no evidence in the record, we submit, to support the view that the Company did or would discharge employees if they did not join the Union and pay their fees and dues, as the Board's brief intimates on page 12. Moreover, it is significant that the Board can only assert that it "*appears*" that every laborer hired at Anchorage was a union member or applicant and that "the record contains no real evidence . . . which militates against the Board's finding of an unlawful agreement" (Bd. br. p. 12). There is just no evidence that all laborers hired at Anchorage were either members of or applicants in the Union.

14. There is nothing in the record which relates, even remotely, to the petitioners' alleged "prolonged closed-shop practices . . . [and] the fact that such practices are called for by the Union's policy . . ." (Bd. br. 13). The Board made no such findings and, consequently, did not consider or predicate its order upon such alleged "facts".

The foregoing demonstrates that the Board has submitted a statement of facts fundamentally at variance with the record. It would suffice to say of the excursions in the Board brief that "The grounds upon which an administrative order must be judged are those upon which the record discloses its action was based. Findings are essential not only to facilitate judicial review by revealing the factual basis for agency action but also to reflect the 'determination of policy or judgment which the agency alone is authorized to make * * *.' " *NLRB* v. *Capital Transit Co.*, 95 App. D.C. 310, 221 F. 2d. 864, 867. See also, *Carpenters District Council* v. *NLRB*, 44 LRRM 2457, 2458, n. 3 (CADC July 9, 1959); *S. E. C.* v. *Chenery Corp.*, 332 U.S. 194, 196-

197, 318 U.S. 80, 87-88, 94. But the mischief is deeper. For the scope of the excursions in the Board brief is such as to raise the question whether the obligation of the citizen to cut square corners with the Government does not entail the corresponding obligation of the Government to cut square corners with the citizen.

II. We turn now to show that its concept of the law applicable in this case is equally unsound. **FIRST**, the Board attempts to impose upon the petitioner the affirmative duty to disprove or disavow the existence of an illegal arrangement. The Board devotes a large part of its brief to the basic proposition that (Bd. br. p. 21) "the Union has never *denied through witnesses or otherwise,* that it issued dispatch slips only to members or applicants."[2] (Bd. br. p. 21) (For similar statements see Bd. br. pp. 22, 23, 36) (Emphasis supplied).

Under the statute the burden rests with the General Counsel and the Board to prove affirmatively and by substantial evidence the facts which it asserts. See *NLRB* v. *Swinerton,* 202 F. 2d. 511 (CA 9) cert. denied 346 U.S. 814; *NLRB* v. *Thomas Rigging Co.,* 211 F. 2d. 153 (CA 9) cert. denied 348 U.S. 871; *Interlake Iron Corp.* v. *NLRB,* 131 F. 2d. 129 (CA 7); *NLRB* v. *Gottlieb,* (CA 5, 1948) 208 F. 2d. 682; *NLRB* v. *Kaiser Aluminum Corp.* (CA 7, 1950) 217 F. 2d. 366; *NLRB* v. *Amalgamated Local 286,* etc., 222 F. 2d. 95 (CA 7, 1955); "The evidence is upon the Board throughout to prove its allegation, and this burden never shifts." *NLRB* v. *Winter Garden Apts. Projects,* (CA 5, 1958) 238 F. 2d. 138. "The [Respondent] does not enter the fray with the burden of explanation * * * An unlawful purpose is not lightly to be inferred." *NLRB* v. *McGahey* (CA 5, 1956) 233 F. 2d. 406. The Board argues * * * " as though

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[2] The extremity of this position can be gauged by the Board's suggestion that Groothuis who was present at the hearing should have testified (presumably, we must suppose, after the Trial Examiner dismissed the charge against the Union) (Bd. br. p. 22); by the Board's strange complaint that Bynum's (a personnel man for the Company) failure to testify is not explained (Bd. br. p. 23); and by the Board's speculation that the job steward and Business Representative must have believed that the Union had a closed shop (Bd. br. p. 22).

the burden was upon the Respondent to exonerate itself of the charges made against it. The burden, however, was upon the Board * * * affirmatively and by substantial evidence." *(NLRB* v. *Reynolds Intl. Pen Co.,* (CA 7, 1947) 162 F. 2d. 650. Accord: *NLRB* v. *Union Mfg. Co.,* 124 F. 2d. 332; *NLRB* v. *Miami Coca Cola Bottling Co.,* (CA 5, 1953) 222 F. 2d. 341. "Their silence affords no rational basis for inferring" that they are responsible for the alleged wrong of another. *International Ladies Garment Workers Union* v. *NLRB,* 237 F. 2d. 545 (CADC 1956).

SECOND, the Board contends strenuously that petitioner's reference to *Mountain Pacific Chapter of Associated General Contractors, Inc.,* 119 NLRB 883, remanded 44 LRRM 62 (CA 9, No. 15966, Aug. 28, 1959) should be disregarded. (Bd. br. pp. 19-20). Petitioner has clearly demonstrated in its main brief that (1) the invocation of the *Brown Olds* doctrine is an abuse of discretion and punitive because, inter alia, it represents an attempt on the part of the Board and its General Counsel to coerce compliance with the mandatory hiring hall standards enunciated by the Board in its *Mountain Pacific* case and that (2) the Board's theory here of "inherent coercion" is precisely the same per se doctrine as was involved in the *Mountain Pacific* case. In addition, petitioner now relies on this Court's subsequent *Mountain Pacific* decision, because once again squarely before this Court is the basic hiring hall issue. The Board (Bd. br. p. 20) still contends that "the testimony * * * that the Company required dispatch slips as a condition of hire [which] stands undenied in the record * * * is sufficient to establish that the Company violated the Act."[3] Of course, this requirement is not established

[3] The Board's brief asserts that the Union's argument assumes the propriety of the Board's finding that dispatch slips were required as a condition of hire. Just how petitioner could object more vigorously to the Board's findings is hard to fathom. The petitioner does not know what requirements, if any, the Company may have had regarding employment. But, of even greater significance is the total absence in the record of any evidence to establish the existence of any Company requirement that dispatch slips were necessary as a condition of hire. The Union pointed out that Wargny's testimony was incredible, that he

in the record; moreover, as we have pointed out, the dispatch slip plays a vital non-discriminatory role in the operation of a hiring hall and the utilization of dispatch slip in connection with the operation of a hiring hall in not per se violative of the Act. As this Court plainly stated as a reaffirmation of basic law in *Mountain Pacific,* "The hiring hall is legal and has always been held so." Thus, assuming arguendo, that the Company required dispatch slips, such a requirement does not violate the Act.

THIRD, The cases relied upon by the Board as warranting its finding of an unlawful hiring arrangement and practice are simply not in point. (Bd. br. p. 19)[4] In the *Local 743* case, pursuant to an arrangement, *four men were refused employment* because they were not members of the Union and *the Union actually discriminated in favor of members.* In the *Local 369* case, pursuant to an arrangement, *a man was denied employment* because he was not a member of the Union *and the Union refused to accept his membership* application. In the *Local 571* case, closed-shop provisions in the agreement were given effect and a *worker was denied employment* because of an outstanding fine. In the *Local 803* case *an employer* at the Union's behest *accorded priority* in casual hiring *to those who exhibited Union books and non-union workers were "knocked off jobs"* at times on a showing by the Union that paid up members were available or seeking work. Clearly, all four cases involve *actual* discrimination and illegal closed-shop

[4] *NLRB* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, AFL,* 202 F. 2d. 516, (CA 9); *NLRB* v. *Local 369, International Hod Carriers, Building and Common Laborers' Union of America, AFL,* 240 F. 2d. 539, (CA 3); *NLRB* v. *United Brotherhood of Carpenters and Joiners of America, Local No. 517, AFL,* 230 F. 2d. 256, (CA 1); *NLRB* v. *Local 803, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL,* 218 F. 2d. 299, (CA 3).

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was not credited by the Trial Examiner, but that even if he had been credited by the Examiner any slight inference which might possibly arise was negated by the record as a whole. To insist that the Trial Examiner was under a duty to consider the *cold* record and disregard the credibility of witnesses entirely misconstrues the functions of a Trial Examiner as a fact finder and elevates form over substance.

or union preferential hiring agreements or arrangements. None of these elements are present in the instant case.

FOURTH, the Board's contention that the cases relied upon by the Union[5] are inapplicable is similarly without merit. The Board contends that the *Thomas Rigging Co.*, and *Painters* cases are distinguishable because of the Union's participation in the Company's hiring process and its insistence on obtaining the benefits to it. (Bd. br. pp. 19, 20, fn. 15) There is no credible evidence in the record to sustain these naked statements. Both cases, we submit, are directly in point.

The Board's effort to distinguish the holding in the *Webb* case (196 F. 2d. 841), is, indeed, remarkable. Here, as in *Webb,* not only was the employer free to hire directly—the Board's assumption to the contrary is in utter disregard of the record—but also whereas in *Webb* there was "no single instance shown of a non-union man applying for a job, either at the site of the project or at the union hall" (196 F. 2d. 846), in the instant case the record plainly shows non-union men applying for, obtaining and retaining jobs at the project site. Thus, the evidence here of an illegal "agreement" or "arrangement" is even more tenuous than it was in the *Webb* case.

FIFTH, the Board attempts, in part,[6] to justify its blun-

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[5] In *Thomas Rigging, supra,* the Union had refused to issue a clearance to non-members. There, the employer had a discriminatory hiring policy. The Court refused to affirm the Board's decision because there was no direct evidence to connect the Union with the Company's unlawful conduct. The Court ruled that the Union had no duty to disavow and could not be held liable on inference or speculation.

In the *NLRB* v. *Brotherhood of Painters, etc.,* case, (242 F. 2d. 477), all but three employees were Union members. The Court found that there was no evidence of negotiation to channel applicants through the Union, that no agreement of any kind relative to hiring existed, and that the *employer was free to employ non-union men at the jobsite or to discontinue, at its pleasure, the use of the Union's facilities for procuring workmen.* The Court, therefore, did find that *any unilateral practice on the part of the employer could not be binding on the Union because neither* the Union nor the employer can be held liable for the unilateral actions of the other. Accord, see *NLRB* v. *International Union of Operating Engineers, Local 12,* 237 F. 2d. 670 (CA 9).

[6] The Board also contends that the Union cannot contest the application of the order "to other employers" because it failed to except to the Trial Exam-

der buss injunctive order by stating that the Union had a well-established "policy" of seeking to obtain from all employers closed shop conditions because union members were obligated "to do all in [their] power to procure employment for [members] in preference to any and all non-union men." (Bd. br. pp. 21, 13, 28, 29).

That a union member can so act within the framework of existing law seems to escape the Board; clearly, the commission of illegal acts cannot be presumed from a mere reading of a statement in an application form for union membership.[7] In any event, the Board's repeated reliance upon this "policy" argument exposes the shallowness and grotesqueness of the Board's position. The allegation concerning this "policy" is contained in paragraph 5 of the complaint (R. 9). No evidence was introduced to support it. The Trial Examiner dismissed the complaint against the Union (R. 27). The General Counsel did not except to the dismissal of paragraph 5. The Board's original decision and order of remand did not consider it, nor did the Trial Examiner in the Supplemental Intermediate Report consider it. The General Counsel again did not except. The Board, as to this point, adopted the Trial Examiner's findings. Now, incredible as it seems, the Board is urging this very allegation, contrary to its own finding, as the major ground in support of its sweeping order.

SIXTH, The Board's brief musters a blend of generalities to support the invocation of the so-called "remedial" refund order. Assuming, arguendo, the existence of a

[7] The pledge attached to an authorization card does not in any manner constitute a policy of 8(b)(2) discrimination. The obligation is not directed to an officer or dispatcher but is merely an oath of fealty (administered to all members of all Local Unions by virtue of a Uniform Constitution of Local Unions) running to the individual member and binding in spirit. Clearly, however, this moral obligation which an individual member as such has a right to fulfill is limited by his legal obligations. Officers of the Union, including dispatchers, take a separate oath, which in no way includes any preferential provision. Finally, the very fact that many non-union employees were hired, in this case, negates the notion of a closed-shop policy of the Union.

iner's recommendaion (Bd. br. p. 20, fn. 23). This contention lacks merit. The Union did specifically except to the recommended order (R. 74).

closed-shop arrangement, we respectfully submit that there is no substantial evidence in the record to support a conclusion that any employee joined the Union involuntarily.[8] Again, the record is replete to the contrary. The Union is both the legally *recognized* and chosen representative of Morrison-Knudsen's employees, and its membership is and has been composed for many years of virtually all construction laborers within its jurisdiction. We do not contest the Board's power to draw "reasonable inferences from proven facts." *Radio Officers Union* v. *NLRB,* 347 U.S. 17, 49. At the same time we consider it beyond cavil that the Board cannot indulge in "mere conjectures" or "extravagant and unwarranted assumption." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 238. Board inferences are to be "reasonable" as the Court stated eight separate times in four pages in *Radio Officers,* supra, 347 U.S. at 49, 52.

The Board's reliance upon the *Virginia Electric* decision (319 U.S. 533) is misplaced—that case presents a far different situation. There, the Company initiated and thereafter dominated a company union to thwart a national union, "negotiated" a closed shop and compulsory check-off arrangement to entrench it and insure its financial stability and contributed financial and other support to it. The Union was not the result of free choice by the majority of employees. Employees who failed to join were discharged. It was declared void from its *inception* and ordered disestablished because this company creature could never truly represent the interests of the employees. The controlling charactristics were *interference with the selection of a bona-fide statutory bargaining representative* and a *company established and dominated Union,*[9] "a type

[8] The Board's argument to the contrary that two employees paid their dues in advance is specious. There is no testimony that they were required to pay their dues in advance. Many Union members do. Innumerable reasons may have motivated them, including the fact that if they rejoined the Union the following year it would have cost more money, or because they wanted to pay their dues while they had the money.

[9] In the initial years of the Wagner Act, the Board was faced with a series of cases, of which *NLRB* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 269 (1937) was representative, where employers set up company dominated unions

of organization", as expressly noted by the Supreme Court, "which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest." 319 U.S. at 544.[10] Moreover, Justice Frankfurter concurring in *Virginia Electric* underscored the need for evidence of coercive payments in order to support the refund order.

The other cases cited by the Board (Bd. br. pp. 34, 35) are also clearly distinguishable. *Dixie Bedding Manufacturing Co.* v. *NLRB,* 268 F. 2d. 901 (CA 5) involved a situation where a Company, faced with the prospect of organizational activity by two unions, illegally recognized one, a minority union, expressly in return for "better terms" and signed an illegal union security agreement, and thereafter paid the initiation fees and dues of its employees rather than grant a wage increase. In *Local Lodge 1424, IAM* v. *NLRB,* 264 F. 2d. 575, cert. granted June 22, 1959, the Company extended recognition to a Union which did not represent a majority of workers, at a time when another Union was engaged in organizational activities, and signed a union-security and check-off agreement. *NLRB* v. *Local 404, IBT,* 205 F. 2d. 99 (CA 1), involved a situation where a union shop provision which applied to one plant was illegally applied to another plant, whose employees were represented by another union at the time when a self-

[10] Labor history, as Congress and the Court had recognized, was replete with the shortcomings of company unions, with their impotence in times of stress and with their frequent betrayals of their members' interest. See Millis and Montgomery, the Economics of Labor; Organized Labor, Vol. III, pp. 879, 886 (1945); Dulles, Labor in America, pp. 261, 277 (1949). Contrast this representation with the well known fact that the Local here has established the highest wages, working conditions, and benefits for construction laborers in America. Construction Labor Report 1959-1960 Wage Rate Guide, BNA, October 28, 1959.

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and bore all the expense, because they felt that frustration of employee desires warranted this outlay. When this device was outlawed, more sophisticated stratagems were then adopted, e.g. to establish a company union, recognize it, and then enter into a closed-shop, check-off contract as in the *Virginia Electric Power* case. But, in all such cases, "a dominated union is deemed *inherently incapable* of representing its members." *NLRB* v. *Pennsylvania Greyhound Lines,* ibid, at 270 (emphasis supplied).

determination election was pending and approximately 40 employees signed up specifically "under protest." In addition to non-majority status and the pendency of an election, there was clear evidence of actual coercion. In *NLRB* v. *Broderick Wood Products Co.,* 261 F. 2d. 548 (CA 10) the situation was virtually identical to the *Local 404* case, supra, and included many actual discharges. Thus, in all these cases the Union was not the freely chosen majority representative and specific acts of coercion including discharge or threat thereof occurred. In such cases there may conceivably be some basis for a rebuttable presumption of involuntary action by employees in joining a Union.

The remaining case cited by the Board, namely *NLRB* v. *General Drivers Local 886,* 264 F. 2d. 21, sustains, we submit, petitioner's position rather than the Board's. In that case none of the employees were members of the Union and enjoyment of contractual benefits to which they were otherwise entitled was expressly conditioned upon joining the Union and authorizing a check-off of dues. Thus, in that case, the Tenth Circuit clearly sustained the Board because there was a concrete showing that Union conduct had compelled involuntary employee action. It is equally clear that the Board's order in that case neither rested upon, nor was sustained by, a theory that there was an irrebuttable presumption of coercion. Here, there has been no showing made by the Board that persons involuntarily joined the Union or were denied negotiated contractual benefits to which they were entitled. Indeed, under the Board's theory here no such showing need be made, and even more significantly, the Union is precluded from showing to the contrary.

The short of the matter is that only one premise could support the Board's theory that all dues and fees collected during the course of an illegal hiring hall arrangement amount to coerced payments even when directly collected by a free, vigorous, traditional and militant bargaining representative not dominated or assisted by any employer.

That false—even insulting—premise, which the Board has never seen fit to articulate, is simply this: No working man would join a labor union and pay dues to it unless he was compelled to do so by a union security arrangement.

To buttress this "extravagant and unwarranted assumption," the Board has not deigned to cite a single historical study or a single economic survey.[11] It is simply not the fact that a vague abstraction called a "union" coerces employees into membership. Working men have traditoinally banded together as free citizens and sought to prevent competition from cheap, substandard labor by means of the union shop or some other analogous method. The experience of a hundred years attest this. Commons, supra, Vol. 1, pp. 596-600.[12]

In the light of the historical experience and the Board's own experience with the union security elections (see Pet.'s br. pp. 35-36), the inescapable conclusion is that the overwhelming majority of workers freely represented by unions voluntarily embrace union conditions, and any other inference, we submit, is patently "unreasonable" within the meaning of the *Radio Officers* decision, supra.

The full dimensions of the *Brown-Olds* doctrine now stand revealed. Upon an *a priori* proposition that workers would not join unions and pay dues but for the existence of union-security arrangements, a proposition plainly at variance with history, recent empirical data squarely in point, and with the record,[13] the Board has erected a doc-

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[11] On workers' motives for joining unions, see Commons and Associates, History of Labor in the United States, Vol. 1, pp. 169-184, 575-576 (1918), Vol. II, pp. 43-48, 301-306 (1918), Vol. IV pp. 621-630 (1935); *AFL in the Time of Gompers*, Taft, (1957) pp. 1-13.

[12] Union hiring halls in the building and construction industry were established and are maintained by building craftsmen banded together, as the best means to decasualize employment, avoid long and continuous searches for intermittent employment and to assure working under uniform wage, hour and working conditions. Union operated hiring halls manifest the uncoerced desire and will of the employees.

[13] See, for example, Wyman's testimony as set forth on page 13 of Petitioner's main brief. Another college student, Crowe, testified "I figured the reason we were going to get this three forty an hour was because the Union had set up those standards. I had no objection to joining." (R. 211-212).

trine of "inevitable coercion" of dues payments, and it has sufficiently insulated its jerry-built structure from any contact with reality by refusing even to consider evidence which would contradict factually the conclusions which it has reached through unreasonable inferences.[14]

The Board in support of its "inherent coercion" doctrine states that even subjective evidence of employees to the contrary will not avail and cites in support thereof *Radio Officers,* supra, and *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, which, when fairly considered, refute rather than support the Board's contentions.

In *Donnelly Garment,* the Board had been instructed by a Court of Appeals to admit and consider testimony by a company's employees that they had voluntarily organized and joined a union which the Board had charged was company-dominated. After a painstaking examination, the Court concluded that the Board had in fact obeyed the mandate of the Court of Appeals, even though the Board still remained convinced that the Union was company

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[14] As the Board bluntly argues at p. 36 of its brief, its doctrine of inevitable coercion precludes disproof. The Board has taken this position not only in theory but in practice. In *United States Steel Corp. (American Bridge Division),* 122 NLRB 155 (1959), the Board applied the compulsory reimbursement remedy against a Union despite the fact that it was never sought by the General Counsel at any stage of the proceeding and despite the Trial Examiner's Intermedite Report which was favorable to the Union. The Union, on April 3, 1959, filed a motion to reopen the proceedings "to receive evidence as to employees who voluntarily paid initiation fees and dues to the Union during the period in question and were not in fact required to do so to secure or retain employment with Respondent Company." On May 4, 1959, the Board's Executive Secretary entered an order for the Board denying the union's motion "on the ground that nothing has been presented that was not previously considered by the Board."

The final and inevitable step in this perversion of logic was taken by a Trial Examiner, in *Lummus Corp.,* NLRB case No. 4-CB-384 in an Intermediate Report filed on August 10, 1959. Faced with the threat of a *Brown-Olds* order, the Union had made an offer of proof at the hearing through the form of testimony of members and financial statements, to "establish that union members were not *coerced* by the unlawful contract but instead paid dues and other fees to the Local voluntarily. . . ." (Mimeo. copy p. 8). Citing *Nassau and Suffolk Contractors Ass'n., Inc.,* 123 NLRB No. 167, 44 LRRM 1138, 1139 (1959) and *Saltsman Construction Co.,* 123 NLRB No. 142, 44 LRRM 1085, 1086 (1959) for the proposition that "an unlawful exclusive hiring contract *inevitably* coerces employees," the Trial Examiner rejected the proffered evidence. *Ibid* (Emphasis in the original).

dominated. At no point did the Court suggest that "subjective evidence" was not a factor. Indeed, it expressly noted that it was "not called upon to lay down a general rule of materiality, regarding such testimony." 330 U.S. at 231.

Radio Officers, we grant, upholds the power of the Board to draw "reasonable inferences from proven facts" without the necessity in every instance of having "subjective evidence of employee response." 347 U.S. at 49, 51. But nowhere is there any indication that the Board is authorized to draw an inference in splendid disregard of proven facts. Nowhere is there any indication that the Board may make such an inference irrebuttable by refusing to consider proffered testimony in contradiction of it. Especially pertinent on this point are the words of Justice Frankfurter, concurring in *Radio Officers* in an opinion in which he was joined by Justices Burton and Minton.

> "But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board *must* take into consideration. The Board's task is to weigh *everything* before it, including those inferences which, with its specialized experience it believes can fairly be drawn." 347 U.S. at 56-57. (Emphasis supplied.)

We did not think that the Board could or would deny that the primary purpose for employing the *Brown-Olds* remedy, as demonstrated in Petitioner's main brief, is to enforce adherence to the three standards enunciated in its *Mountain Pacific* decision, 119 NLRB 883 (1958). This Court, however, refused to enforce the Board's order in *Mountain Pacific,* declaring it "patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action." *NLRB* v. *Mountain Pacific Chapter, et al.*, (CA 9, 1959) No. 15, 966, 44 LRRM 2802, 2806. This Court, in effect, thus has indicated its disapproval of the primary factor which motivated the Board in applying the *Brown-Olds* remedy in this case. Significantly it struck down the

Board's attempt to operate on the same basis on which it is here trying to operate, viz. on the basis of per se doctrines rather than reasonable inferences of fact. That the utilization of this so-called remedy is arbitrary and capricious may perhaps be best illustrated by the statement of a Board Trial Examiner, who, while reluctantly applying the remedy recently, characterized it in the following manner:

> "*Brown-Olds is a meat-axe remedy applied in a meat-axe fashion* * * * inequities are inherent in applying *Brown-Olds*. One of these is that it is left to the charging party to determine whether all or only one or more of equally guilty, contracting parties will be held liable for reimbursement." [15] (Emphasis supplied.)

Significantly, the mechanistic application of the *Brown-Olds* remedy reflects the Board's failure to take any account of the legality of a union shop under the proviso to Section 8(a)(3) of the National Labor Relations Act. Under this proviso, in all States not having "right-to-work-laws", a legitimate collective bargaining representative can enter into an agreement with an employer requiring union membership, as a condition of employment, after the thirtieth day following the beginning of employment. Accordingly, even assuming arguendo that some employees may have been coerced into joining a union involuntarily by a closed-shop arrangement, the Union "[at] most may have collected only one month's dues in excess of those to which it was equitably entitled."[16] So far as the men on the job are concerned—and these are the only ones covered by the refund order—this is realistically the sole injurious

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[15] *Ingalls Steel Construction Co.*, NLRB Case No. 15-CA-1174 (1959). Intermediate Report, Mimeo copy p. 10.

[16] Board Member Petersen, dissenting in *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594, 607 (1956). If no union shop or no union at all (as this Board's logic would lead one to believe) is what the employees want, deauthorization or decertification petitions are always available. See para. 9(c) and (e) of the National Labor Relations Act as amended, 61 Stat. 144-145, 29 U.S.C. para. 159 (C)(e); H.R. rep. No. 245, 80th Cong. 1st Sess. p. 25.

effect of a closed-shop arrangement.[17] The Board utterly refuses to face up to this fact despite the Supreme Court's admonition that "only actual losses should be made good." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198.

SEVENTH. The Board's reply to the petitioner's contention that the unique *circumstances* and factors surrounding the construction of the projects in this case and in Alaska in general should have been taken into consideration by the Board in formulating an appropriate remedy is a complete non-sequitur. That Congress in the 1959 amendments to the Act specifically required the Board to assert jurisdiction over labor disputes affecting the National Defense is simply no answer to petitioner's contention. Petitioner never suggested, let alone stated, that the Board should refuse to assert jurisdiction over National Defense projects. The Petitioner, in part, stated that the Board should have been aware of the National Defense Effort and given due regard to the problems therein involved and to the effect its proposed "remedy" would have on this vital undertaking before applying a mechanistic remedy. Board orders cannot be applied "mechanically." They must take "fair account * * * of every socially desirable factor in the final judgment." *Phelps-Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198.

Indeed, the 1959 amendments underscore the validity of the position of the petitioner. Congress passed a specific amendment[18] which recognized the uniqueness of the building and construction industry and specifically legalized, for

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[17] In the recently enacted Labor Management Reporting and Disclosure Act Congress took recognition of the *unusual employment practices* in the construction industry and inserted a provision permitting unions and employers engaged "primarily in the building and construction industry" to enter into a contract, even though the majority status of the Union had not been established under Sect. 9 of the Act prior to the making of the agreement, which requires membership in the Union as a condition of employment after the *seventh* day following employment or the effective date of the agreement, whichever is later. (Sec. 705(a) Labor Management Reporting and Disclosure Act.)

[18] The amendment originated in the Senate Labor Committee and was enacted into law in the exact language approved by the Committee, 29 U.S.C. 158, 73 Stat. 545. See Appendix, p. 21.

that industry, pre-hire agreements, seven-day union shops, first opportunity clauses requiring employers to notify the Union of vacancies and to give it an opportunity to refer qualified applicants and Union operated exclusive hiring halls. While this amendment may raise an issue of "mootness", at the very least it suggests that Congress is in violent disagreement with the Board. Congress has recognized and specifically acted upon those factors which the Board here states are of no import. The Senate Labor Committee after first analyzing the uniqueness of the industry, stated:[19]

> "During the Wagner Act period, the National Labor Relations Board declined to exercise jurisdiction over the industry not only because of these *complexities,* but also because the industry was *substantially organized* and hence *had no need of the protection afforded* by the Act. *Concepts evoked by the Board therefore developed without reference to the construction industry.* In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the Act to the building and construction industry.
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> "That the application of the Act to the construction industry has given rise to serious problems is attested by [a long list of citations, including numerous Hearings, Reports, and Presidential messages] in which the difficulties of the industry are set forth in detail. * * * The bill endeavors to resolve certain urgent problems." (Emphasis supplied.)

The Committee's report analyzed the characteristics of this industry, outlined the dynamic economic reasons why employers utilize union operated hiring halls in the industry and found that *"a substantial majority of the skilled employees in this industry constitute a pool centered about their appropriate craft union."* (Emphasis supplied.)[20]

We have shown in our main brief that the compulsory reimbursement remedy was extended, per se, to the construction industry to coerce it to comply fully, in writing, with the standards enunciated in the Board's *Mountain Pacific* decision, which this Court has refused to enforce.

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[19] Senate Rep. No. 187, 86th Cong., 1st Sess. p. 27.

[20] *Id.* at p. 28.

Here, the Board has retroactively applied this "remedy" to a case which arose prior to the enunciation of the *Mountain Pacific* standards even though both the employer and Union have complied voluntarily with these standards.

Respectfully submitted,

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November, 1959

APPENDIX

Building and Construction Industry

Sec. 705 (a) Section 8 of the National Labor Relations Act, as amended by section 704(b) of this Act, is amended by adding at the end thereof the following new subsection:

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further:* That any agreement which would be invalid, but for clause (1) of this subsection shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."